SCORE OPTION SDN BHD & ANOR A

v.

DUAR TUAN KIAT & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AMELIA TEE ABDULLAH JC
[CIVIL SUIT NO: 22 NCVC-224-2011]
13 JULY 2011

COMPANY LAW: *Directors - Powers of directors - Whether directors of companies under receivership had locus standi to sue receivers and managers in companies' names - Whether action interfered with functions of receivers and managers and threatened debenture holder's interests - Whether directors' failure to give companies indemnity as to costs material - Whether receivers and managers could sell charged land by tender/private treaty without resort to judicial sale - Companies Act 1965, ss. 192(2) & (3)* C D

In consideration for the grant of several loan facilities to them, the first and second plaintiffs executed debentures over their assets and charges over a piece of land ('the land') in favour of the third defendant bank ('MBB'). As a result of the plaintiffs' default on the loan facilities, MBB exercised its right under the debentures to appoint the first and second defendants as receivers and managers ('R&M') for the plaintiffs. When the R&M entered into a sale and purchase agreement with the fourth defendant ('Glomac') for sale of the plaintiffs' assets, which included the land, the directors of the plaintiff companies ('the directors') brought the instant action in the name of the companies, *inter alia*, for various injunctive reliefs. Essentially, the directors wanted to prevent the sale of the land to Glomac. The R&M entered conditional appearance and applied to set aside the writ and statement of claim on the ground the directors lacked *locus standi* to bring and maintain the action against them. The R&M said that the directors' action, *inter alia*: (i) interfered with their main function of collating and realising the assets of the companies to protect the interests of the debenture holder; (ii) prejudiced the debenture holder's position as it threatened the very assets that were subject to the charge; and (iii) failed to provide for an indemnity to the plaintiff companies for costs in the event they failed in their claim. The directors, one of whom was a bankrupt, were only prepared to give an undertaking as to costs. They also said since the land E F G H I

was subject to a legal charge, the R&M could not sell the land by tender or private sale but only pursuant to the provisions of the National Land Code ('NLC').

Held (striking out the suit with costs to be borne by the directors personally):

(1) The directors had no *locus standi* to commence the action in the names of the plaintiffs against the R&M. The directors would only have the power to institute proceedings if doing so would not impinge prejudicially upon the position of the debenture holder. However, in the instant case the R&M were appointed in consequence of the plaintiffs' default. The directors' action, which was essentially to stop the sale of the land to Glomac and secure its return to the plaintiffs, interfered with the functions of the R&M to get in and realise the plaintiffs' assets and threatened MBB's interests as debenture holder. (paras 20, 32, 42 & 43)

(2) The directors' failure to give the plaintiff companies an indemnity against costs and damages would have placed an inordinate and additional financial burden on the plaintiffs which would have had a direct impact on its assets. The mere pleading that the directors were giving an undertaking as to costs fell far short of the requirement of giving an indemnity as to costs. (paras 42 & 36)

(3) The provisions of s. 256(2) of the NLC, prescribing judicial sale, did not apply to the instant case as the R&M were acting as the agent of the chargor of the land as authorised by the debenture between the plaintiffs and MBB. (para 41)

Case(s) referred to:

Deangrove Pty Ltd (recs and mgrs apptd) and Anor v. Commonwealth Bank of Australia 2002 AUST FEDCT LEXIS 370 ***(refd)***

In re B Johnson & Co (Builders) LD [1955] 1 Ch 634 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(dist)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC ***(foll)***

Moss Steamship Co Ltd v. Whinney [1912] AC 254 ***(refd)***

Newhart Development Ltd v. Co-operative Commercial Bank Ltd [1978] 2 All ER 896 ***(foll)***

Risasa Industry (M) Sdn Bhd v. Malaysian Industrial Development Finance Bhd & Anor [2008] 6 CLJ 667 HC ***(refd)***

Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors [2006] 1 CLJ 41 CA ***(foll)***
Tan Ah Teck v. Coffral (M) Sdn Bhd [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63 HC ***(refd)***
Tudor Grange Holdings Ltd and Others v. Citibank NA and Another [1991] 4 All ER 1 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 192(2), (3), 223
National Land Code, s. 256(2)
Rules of the High Court 1980, O. 12 r. 7

For the plaintiffs - V Siva (R Thayalan, Mogan RK & Jennifer Chandran with him); M/s Vaasan Chan & Chandran
For the 1st and 2nd defendants - TM Eng (Celestina Chin with her); M/s Jal & Lim

Reported by Ashok Kumar

JUDGMENT

Amelia Tee Abdullah JC:

The Parties

[1] The plaintiffs, Score Option Sdn Bhd ("Score Option") and Austral Development Sdn Bhd ("Austral Development"), in respect of whom receivers and managers have been appointed, have filed a writ of summons and statement of claim against the defendants *inter alia* claiming various injunctive reliefs.

[2] Duar Tuan Kiat ("the 1st defendant") and Adam Primus Varghese bin Abdullah ("the 2nd defendant") are sued as the appointed receivers and managers of Score Option and Austral Development. The court agrees that essentially it is the Directors of the Score Option and Austral Development who are pursuing this action against the defendants. As such, to prevent confusion, the court will refer to the party making this claim as 'the Directors' and the Score Option and Austral Development as the 1st and 2nd plaintiffs respectively.

[3] The 3rd defendant, Malayan Banking Bhd, had granted several loan facilities to the 1st and 2nd plaintiffs for the purchase of land held under HS (D) 112510 Lot No. PT 2063 Mukim and District of Petaling, Selangor Darul Ehsan, Selangor (hereinafter referred to as "the impugned land"). The 1st and 2nd plaintiffs

had executed three debentures dated 10 April 2008 in favour of the 3rd defendant creating a fixed and floating charge over its moveable and immoveable assets as well as executed charges in favour of the 3rd defendant in respect of the impugned land. It was as a result of the default of the 1st and 2nd plaintiffs in respect of the loan facilities that the 3rd defendant exercised its right under the debentures to appoint receivers and managers for the 1st and 2nd plaintiffs on 29 January 2010.

[4] Glomac Alliance Sdn Bhd ("the 4th defendant") entered the picture when the receivers and managers entered into a Sale and Purchase Agreement dated 21 January 2011 with it for the sale of the plaintiff's assets which includes the impugned land.

[5] In its statement of claim, the plaintiffs are seeking various injunctive relief, *inter alia*, to restrain the defendants from proceeding with the Sale and Purchase Agreement dated 21 January 2011 entered into between the 1st plaintiff and the 4th defendant relating to the land.

[6] The 1st and 2nd defendants have entered conditional appearance on 1 April 2011. *Vide* encl. 3, they have now filed a summons in chambers to set aside the writ of summons and statement of claim pursuant to O. 12 r. 7 of the Rules of the High Court 1980 on the grounds that the Directors, while pursuing the action in the names of the 1st and 2nd plaintiffs, lack the *locus standi* to maintain the action against the 1st and 2nd defendants.

The Affidavits

[7] In its affidavit in support (encl. 14), the 1st defendant has averred that the Directors do not have the *locus standi* to commence the action against the 1st and 2nd defendants as the Directors have failed to satisfy the conditions necessary to enable them to commence action against the 1st and 2nd defendants as receivers and managers of the 1st and 2nd plaintiffs. In his affidavit in reply (encl. 19), Chek Jamal bin Baharom, one of the Directors of the plaintiffs and a shareholder of the 2nd plaintiff, had taken issue with the 1st and 2nd defendants incorporating two separate affidavits in respect of two separate applications in a single affidavit. There was also a complaint that the 1st and 2nd defendants had not supported their claim that the Directors lack *locus standi* with relevant case law to enable them to reply specifically and appropriately. *Vide* encl. 25, the 1st defendant states that the Directors do not have *locus standi* because "such

action is tantamount to an interference of the functions of the receivers and managers and affecting the assets of the plaintiffs". In response, Che Jamal bin Baharom has affirmed an affidavit (encl. 31) stating that the directors of the plaintiffs are entitled to commence this action "untuk kebaikan plaintif-plaintif dan juga pihak-pihak lain yang mungkin terlibat secara tidak langsung".

The Law

[8] The issue as to whether the directors of a company in receivership has the *locus standi* to commence an action against the debenture holders was decided in the case of *Newhart Development Ltd v. Co-operative Commercial Bank Ltd* [1978] 2 All ER 896. In that case, the directors of a company in receivership had, without the receiver's knowledge or consent, commenced an action against the debenture holders for damages for breach of contract by reason of withdrawal of financial support. The defendants applied to set aside the writ on grounds of irregularity in that it was issued without the receiver's knowledge or consent. Upon the registrar dismissing the application, the defendants appealed to a judge who allowed the appeal and ordered the writ to be set aside on grounds of irregularity. The plaintiffs appealed. The defendants had contended that on the appointment of the receiver, the plaintiffs were divested of all power to bring an action and only the receiver could institute and pursue the action in question.

[9] In allowing the appeal, Shaw LJ had this to say:

> One has got to see what the function of a receiver is. It is not, of course, to wind up the company. It is perhaps interesting to note in passing that when a liquidator is appointed ... the powers of the directors immediately cease by statutory provision. There is no such provision in relation to the appointment of a receiver, whose duty it is to protect the interests of the mortgagee or debenture holders, as the case may be. Insofar as it is requisite and necessary for him, in the course of his dealing with the assets of the company, bringing them in and realizing them and so on, to bring actions as well, he is empowered to do so by the debenture deed in the name of the company. That makes it possible for him to institute such proceedings without exposing himself to the risk of a liability for costs if those proceedings should fail. But the provision in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the

A directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation *where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperiling the assets which are subject to the charge.* (emphasis added)

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[10] Learned counsel for the 1st and 2nd defendants have also cited the case of *Tudor Grange Holdings Ltd and Others v. Citibank NA and Another* [1991] 4 All ER 1. In that case, the companies had commenced action against the bank for misrepresentation C without the receiver's consent. In ordering the statement of claim to be struck out and the action dismissed, Sir Nicholas Browne-Wilkinson V-C held that although in certain circumstances company directors had power to bring proceedings on behalf of the company even after the appointment of a receiver who had D power to bring proceedings on the company's behalf, they had no power to do so where the receiver's position would be prejudiced by their decision to bring proceedings. Since the action commenced by the directors of the plaintiff companies in the plaintiff companies' name could directly impinge on the property E subject to the receivers' powers because the directors held no indemnity against the liability of the companies' assets to satisfy a hostile order for costs made against the companies, it followed that the directors had no power to start the proceedings. However, since there was a possibility of such an indemnity being F forthcoming the action would not be struck out on that ground alone.

Arguments, Submissions And Findings

G **[11]** The 1st and 2nd defendants have argued that the Directors have not satisfied the conditions to be entitled to commence this action against them as receivers and managers of the plaintiffs. The Directors' main and primary intention in pursuing this action is that they want the return of the impugned land. It was pointed out H that prior to the appointment of the receivers and managers, the 1st and 2nd plaintiffs had difficulty in servicing their loan facilities and were involved in various litigations by claimants all of whose claims invariably involved the impugned land. It was submitted that these litigations were a direct consequence of the Directors' I management or mismanagement of the plaintiffs and the impugned land and as such it would be contrary to common sense and ordinary prudence for the 1st and 2nd defendants, as receivers and managers of the plaintiffs, to now relinquish their powers and

allow the Directors to take over the management of the impugned land. It follows there from that any claim for the return of the impugned land would inevitably impinge prejudicially upon on the position of the debenture holder as it threatens the very assets that were subject to the charge.

[12] The second thrust of the 1st and 2nd defendants' argument is that the actions of the Directors would interfere with the functions of the receivers and managers in getting in the assets which were subject to the charge. Various authorities were cited by learned counsel in support of their contention that the main and primary duty of a receiver and manager is to realize the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company (*In re B Johnson & Co (Builders) LD* [1955] 1 Ch 634; *Tan Ah Teck v. Coffral (M) Sdn Bhd* [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63).

[13] It is submitted that since their appointment, the 1st and 2nd defendants have been discharging their duties pursuant to the terms of the debenture which provide *inter alia* for the power to sell the plaintiffs' assets. The effect of the orders sought by the Directors would be to put an immediate stop to the activities undertaken by the 1st and 2nd defendants for the sale of the plaintiffs' assets particularly the impugned land. If the Sale and Purchase Agreement were terminated, the sale of the impugned land would be delayed and the 1st and 2nd defendants would have had to undertake another tender exercise to secure purchasers for the land thus resulting in further delay and more costs. Thus, it is submitted that the Directors' actions would be an interference of the functions of the 1st and 2nd defendants.

[14] The 1st and 2nd defendants have also highlighted that the Directors have not provided an indemnity for costs in the event that they do not succeed in their action. Although it is stated in para. 59 of the statement of claim that the directors of the 1st and 2nd plaintiff gives an undertaking as to costs and the Director Jamariah binti Baharum had in her affidavit also undertaken as to damages, it is submitted by the 1st and 2nd defendants that an undertaking as to costs is not an indemnity as to costs and that in any event no indemnity as to costs have been given to the plaintiffs. Reference was made to the Australian Federal Court case of *Deangrove Pty Ltd (recs and mgrs apptd) and Anor v. Commonwealth Bank of Australia* 2002 AUST FEDCT LEXIS 370

where Sackville J had referred to earlier orders made by him in earlier proceedings between the same parties. *Vide* an order made on 2 October 2002, the court had ordered the 2nd applicant (Mr Jeans) to provide to the respondent an irrevocable bank guarantee for a sum of $87,000 by 7 November 2002, which date was subsequently varied to 16 November 2002. The rationale underlying the making of the order is that the interest of the debenture holder must not be prejudiced by the conduct of the litigation. The governing principle is in order to continue the proceedings, those giving instructions on behalf of Deangrove must demonstrate that "nothing in the course of the proceedings that they institute is going in any way to threaten the interest of the debenture holders". As such, the failure of Mr Jeans to provide the required bank guarantee to support Deangrove's indemnity would threaten the interests of the Bank as Deangrove's debenture holder. In the absence of that guarantee, the Bank is at risk of Deangrove's assets being reduced by reason of the litigation. In the final analysis, the court gave Mr Jeans an extension of time until 8 January 2003 to comply with the court's order. As was said by Sackville J:

> If Mr. Jeans does not provide the guarantee within this period, it seems to me appropriate that the proceedings be dismissed on terms that the applicants be prevented from bringing further proceedings on the same causes of action for the same relief. The applicants have received repeated indulgences from the Court and have had ample opportunity to prepare their case for trial. *If the guarantee is not provided, it would be the clearest possible indication that Mr. Jeans is either unwilling or unable to provide the receivers with the security to which they are entitled if the applicants are to proceed with their claim. The failure to provide the guarantee would also expose the Bank to a risk of financial loss in its capacity as debenture holder if it is still required to prepare for a hearing of the applicants' claims. For the reasons that are explained in Deangrove No. 1, the Bank should not be subjected to that risk.*

[15] As regards the Director Jamariah binti Baharum's undertaking as to damages, it was pointed out that she is an undischarged bankrupt. In light of this undisputed fact, it was submitted that her undertaking as to damages or to pay costs is insufficient and amounts to no undertaking at all. As a bankrupt she does not have the capacity to give any undertaking at all, whether as to costs or damages, as all her assets and liabilities are vested in the official assignee.

[16] And lastly, it was submitted that the Directors' actions were intended to stultify the 1st and 2nd defendants' activities in selling the plaintiffs' assets. By restraining the sale of the impugned land, the Directors are hindering the process of recovery to the 3rd defendant as debenture holder. The effect of the orders sought would be to put a stop to the activities for the sale of the land. This in turn would cause the plaintiffs' indebtedness, as well as the indebtedness of the guarantors, to rise in tandem with the delay.

[17] The plaintiffs have drawn the court's attention to the fact that the 1st plaintiff and the 4th defendant had in early 2003 entered into a Joint Venture Project to develop 90 acres, which said project is part of the impugned land. After 102 units of the proposed development were completed there was a breakdown in the joint venture in 2005 which resulted in the parties being embroiled in Kuala Lumpur Civil Suit S6-22-1154-2006 which is still pending. In the said suit, the 4th defendant is asking, *inter alia*, for the 90 acres to be sold to them for RM32 million whilst the 1st plaintiff had counterclaimed for the return of the 90 acres due to the 4th defendant's breach of its obligations under the Joint Venture Agreement.

[18] The plaintiffs are relying on ss. 192(2) and 192(3) of the Companies Act 1965 as giving them the right to commence this action against the 1st and 2nd defendants. It is obvious that s. 192(2) has no application in this case. Section 192(2) reads as follows:

> (2) If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or being guilty of any misfeasance or breach of trust or duty in relation to the company, any **the Court may, on the application of creditor or contributory or of the liquidator**, examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just. (emphasis added)

[19] At first blush, the court will say that s. 192(2) has no application in this case as the action taken by the plaintiffs is not an application by a creditor, contributory or the liquidator. The

court is unable to see how it could be argued that s. 192(2) would authorise the plaintiffs to commence this action against the 1st and 2nd defendants.

[20] The plaintiffs have relied on the case of *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41 as the authority for the proposition that there is no absolute prohibition upon the plaintiffs from bringing an action against the receivers and managers. The plaintiffs have also relied on the case of *Newhart Development (supra)* which was also cited by learned counsel for the 1st and 2nd defendants. It is interesting to note that that whilst both parties have relied on the same authority, different passages of the decision of Shaw LJ have been quoted by counsels in support of their cases. It is true that the court had held that:

> But the provisions in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperiling the assets which are subject to the charge.

Thus Shaw LJ's pronouncements as to the directors still retaining some power to institute proceedings is a qualified one. They would only have such power to institute proceedings if doing so would not impinge prejudicially upon the position of the debenture holder.

[21] Further, whilst Shaw LJ had clearly stated there is no total extinction of the powers of the directors upon the appointment of receiver:

> It is only within the scope of its assets which are covered by the debenture, and only insofar as it is necessary to apply those assets in the best possible way in the interests of the debenture holders that the receiver has a real function.

From this the court would gather that whilst the directors of a company under receivership may still retain some of their powers, however insofar as it relates to the assets that were covered under the debenture, it is the receivers and managers who would have the ultimate authority.

[22] Various authorities have been cited by learned counsel for the plaintiffs. In the case of *Tan Ah Teck v. Coffral (M) Sdn Bhd* [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63, the court was dealing with the issue of whether the receiver was competent to appear to object to a winding-up petition against the respondent company. In that case, the receiver was appointed pursuant to a debenture but no documents were produced to support their contention that they were acting as agents on behalf of the respondent company. The court held that the receiver was not competent to object to the winding-up order and that the Directors could have brought such objection as the appointment of a receiver does not necessarily bring about a termination of the company's activities.

[23] In the case of *Risasa Industry (M) Sdn Bhd v. Malaysian Industrial Development Finance Bhd & Anor* [2008] 6 CLJ 667, the plaintiffs had made an application for declarations, namely that the appointment of the receiver and manager was null and void. The situation is different in our instant case where the appointment of the receivers and manager has not been challenged.

[24] The Directors have also raised an issue that the 1st and 2nd defendants were in breach of their duties for failing to sell the impugned land in accordance with the National Land Code. They have raised the argument that where security is by way of a legal charge, the power of sale should be effected in the statutory manner pursuant to the provisions of the National Land Code and not by tender exercise or private sale. The authority relied upon by them for this proposition is the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274. The facts of *Kimlin* are essential to the decision and are thus recounted at some length.

[25] The appellant borrower was the registered owner of some lands. It executed two legal charges under the National Land Code over the lands in favour of Bank Bumiputra, the 1st respondent, to secure banking facilities granted to them. The charges were duly registered. Subsequently, the appellant executed a deed of debenture in favour of the 1st respondent to secure various banking facilities whereby the appellant created both fixed as well as a floating charge. The debenture, which was duly registered, provided for the bank to appoint receivers and managers and for their powers. Certain events having occurred, the bank duly appointed the second, third and fourth respondents

as receivers and managers of the appellant. The receivers and managers then applied to the High Court by originating summons for leave to sell the land. On 27 February 1989 the appellant went into liquidation and the application to sell the land was opposed by the liquidators.

[26] The trial judge at first instance held that the receivers and managers were entitled to sell the lands which were subject to the charges without taking proceedings under the National Land Code to obtain a judicial sale and that the fact that the company had been put into liquidation does not affect the securities held by the receivers and managers, at least not until the secured creditors had been fully paid off. The trial judge further held that the receivers and managers were entitled to what the debenture provided. The liquidator appealed against the above decision.

[27] The Supreme Court, in allowing the appeal, held, *inter alia*, that the provisions of the National Land Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights would be void as being contrary to public policy. Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the Code to obtain a judicial sale. The Supreme Court further held that with the advent of liquidation, any sale by the receivers would be a purported sale of property which belonged to the borrower company and the appellant would require the approval of the court under s. 223 of the Act.

[28] Whether the decision in *Kimlin (supra)* is applicable to the facts of our instant case will be dealt with later in this decision.

[29] In coming to a decision, the court has carefully considered the affidavits and written submissions filed by the parties. From the outset, the court would say that it is in agreement with learned counsel for the Directors that there is no absolute prohibition against them from bringing an action in the name of the plaintiffs. The appointment of receivers and managers, as opposed to the appointment of a liquidator, does not end the life of a company. As was said in *Moss Steamship Co Ltd v. Whinney* [1912] AC 254:

> The legal persona of the company will continue to subsist until liquidation. The company is, so to speak, anaesthetized but the receiver may carry on business on its behalf.

[30] However, as to whether a company in receivership can commence action against its own receivers, and if so, the circumstances and conditions under which it can do so, remains to be seen. Both parties have cited the case of *Newhart Development (supra)* as a leading case on this issue. Applying the principles as set out in *Newhart Development* to our instant case, the court is satisfied that the Directors would have *locus standi* to commence this action against the 1st and 2nd defendants as the appointed receivers and managers of the plaintiffs if the following conditions are satisfied:

(i) If the Directors' actions did not interfere with the receivers and managers' function in getting in the plaintiff's assets or prejudicially affect the 3rd defendant as debenture holder by imperiling the assets;

(ii) If the Directors' actions did not in any way threaten the interests of the 3rd defendant as debenture holder; and

(iii) If the Directors have provided an indemnity for the plaintiffs against any possible liability to costs.

[31] As is clearly stated in the statement of claim, the Directors are seeking various injunctive reliefs, *inter alia*, to restrain the defendants from proceeding with the Sale and Purchase Agreement dated 21 January 2011 entered into between the 1st plaintiff and the 4th defendant relating to the impugned land. This is the same land for which various loans had been granted by the 3rd defendant for its purchase by the plaintiffs and in respect of which charges and debentures have been executed by the plaintiffs.

[32] The court notes that it was as a consequence of the default in repayment of the loan facilities granted that receivers and managers were appointed for the plaintiffs. What then is the role of the 1st and 2nd defendants as the appointed receivers and managers? It is to deal with the assets of the plaintiffs, to bring them in and realise them, to distribute the proceeds to the 3rd defendant as debenture holder in satisfaction of its claims and thereafter to return any surplus assets to the plaintiffs. Whilst the Directors may still retain some residual power or authority, in so far as those assets in respect of which the receivers and managers were appointed to bring in and realise, any action by them would tantamount to interference with the functions of the receivers and managers in getting in the assets subject to the charge as well as threatening the interests of the 3rd defendant as debenture holder.

[33] The rationale for care and caution in respect of directors of a company, for whom receivers and managers have been appointed, commencing action in the name of the company lies in the risk of a liability for costs. A company for whom receivers and managers have been appointed can ill afford further dissipation of its remaining assets through misconceived legal action giving rise to a liability for costs. As pointed out in *Tudor Grange Holdings (supra)*:

> Since the action commenced by the directors of the plaintiff companies in the plaintiff companies' name could directly impinge on the property subject to the receivers' powers because the directors held no indemnity against the liability of the companies' assets to satisfy a hostile order for costs made against the companies, it followed that the directors had no power to start the proceedings.

[34] The court has considered whether para. 59 of the statement of claim to the effect that the Directors of the 1st and 2nd plaintiff giving an undertaking as to costs amounted to an indemnity for costs. The court has also considered the undertaking as to damages given by Jamariah binti Baharum in her affidavit. It is not disputed that Jamariah binti Baharum had been adjudged a bankrupt on 2 September 2008. As such at the time when she gave the undertaking, she was an undischarged bankrupt. Notwithstanding RHB's letter dated 2 December 2008, the court finds that the fact remains that Jamariah is an undischarged bankrupt and, as such, has no legal capacity to give any undertaking as to costs or damages.

[35] The court recalls the averments of the Director, Chek Jamal Baharom, in his affidavit, to the effect that the value of the land is more than sufficient to compensate for all losses, if any. The court agrees with the submission of learned counsel for the 1st and 2nd defendants to the effect that this averment would go to show that the Directors are dependent upon the realisation of the impugned land to compensate the parties and that this would prejudice the debenture holder by placing the assets subject to the charge in peril.

[36] In light of the foregoing, the court finds that merely pleading that the Directors of the 1st and 2nd plaintiffs give an undertaking as to costs falls far short of the requirement of giving an indemnity as to costs to the plaintiffs. The court finds that in the absence of any evidence as to the financial position of the

other Directors, excluding Jamariah binti Baharum, and thus their ability to satisfy any order as to costs or damages, coupled with the equivocal averment of Chek Jamal Baharom referred to in para. 35, the court finds that the Directors have not satisfied the requirement for giving an indemnity to the plaintiffs.

[37] The case of *Kimlin (supra)* cited by learned counsel for the Directors have afforded the court some concern as to whether there is a legal requirement for the 1st and 2nd defendants to sell the impugned land in accordance with the provisions of the National Land Code. Reference has been made by learned counsel for the 1st and 2nd defendants to the case of *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86 and a careful perusal of this case will afford the answer. In that case, the first respondent, the registered proprietor of a lease, had executed a debenture and a legal charge in favour of the second respondent bank. Pursuant to the provisions of the debenture, the second respondent appointed a receiver and manager ('R & M') in respect of the assets and undertakings of the first respondent. The R & M was also empowered to act as the agent of the first respondent and to effect the sale of the asset secured by the debenture. The R & M was also appointed the lawful attorney of the first respondent.

[38] The R & M then entered into a Sale and Purchase Agreement with the appellant to sell the lease. Subsequently, the appellant refused to proceed with the agreement on the ground that the R & M did not have the power to sell the lease by private agreement on the authority of *Kimlin (supra)* where the Supreme Court had decided that receivers and managers were not entitled to sell charged lands without taking proceedings under the National Land Code for a judicial sale.

[39] The respondent obtained a declaration in the High Court that the R & M was empowered to sell the lease and the Sale and Purchase Agreement was valid and binding. The appellant appealed to the Court of Appeal which distinguished *Kimlin* and dismissed the appeal. The appellant then appealed to the Federal Court.

[40] At the Federal Court, the issue was whether the facts in *Melantrans* were distinguishable from the facts in *Kimlin* thus entitling the R & M to sell the lease by private treaty. The Federal Court found that in *Kimlin*, the debenture created by the

borrower company did not contain an express provision appointing the receivers and managers as the attorney of the borrower company. Secondly, the borrower company went into liquidation and it was the liquidator who had opposed the application for sale under the debenture. Further, s. 256(2) of the National Land Code provides a prescribed method of sale to be undertaken by a chargee and not a charger. In the case of *Melantrans*, the R & M undertook the sale on behalf of the first respondent, the chargor of the lease. The Federal Court found that the provisions of the National Land Code prescribing judicial sale did not apply because the R & M was acting as the agent for the chargor and not the chargee and thus distinguished the case of *Kimlin*.

[41] Thus applying the reasoning and decision in *Melantrans* to the facts of our instant case, the court is satisfied that the case of *Kimlin* can also be easily distinguished. In our instant case, although receivers and managers were appointed, no winding-up proceedings were commenced nor was any liquidator appointed for the plaintiffs. In this case, cl. 12.1(b) of the debenture entered into between the plaintiffs and the 3rd defendant clearly states that the borrower irrevocably appoints the manager of the lender or one of the officers in charge to be its attorney to demand, sue for and take all appropriate proceedings. Further cl. 12.2 provides that a receiver so appointed shall be the agent of the borrower and shall have power to take possession of, or collect, or get in any charged property. As such, in our instant case as in the case of *Melantrans*, the 1st and 2nd defendants, as receivers and managers were also acting as the agent of the chargor. The provisions of s. 256(2) of the National Land Code prescribing judicial sale therefore do not apply to our instant case. The court thus finds that the case of *Kimlin* can be distinguished.

Conclusion

[42] In conclusion, the court finds that the Directors have not satisfied the court that they have *locus standi* to bring a case in the names of the plaintiffs against the 1st and 2nd defendants as the receivers and managers appointed for the plaintiffs. The court finds that in the circumstances of this case, the action commenced by the Directors which is essentially to stop the sale of the impugned land to the 4th defendant and to secure the return of the said land to the plaintiffs would definitely and undeniably interfere with the functions of the 1st and 2nd defendants in getting in the plaintiff's assets, namely the impugned land. The

actions of the Directors to stop the sale also clearly threaten the interests of the 3rd defendant as debenture holder since the sale and realisation of the assets of the plaintiffs would have enabled the 3rd defendants to be repaid. And lastly, the absence of a clear indemnity against costs and damages by competent directors to the plaintiff would have placed an inordinate and additional financial burden on the plaintiffs which would have a direct impact on its assets.

[43] The court is thus satisfied that the actions of the Directors in commencing an action in the name of the plaintiffs against *inter alia* the 1st and 2nd defendants without giving a proper indemnity to the plaintiffs would run afoul of the principles laid out in *Newhart Development* and followed in *Simpang Empat*. On that basis, the court finds that the Directors have no *locus standi* to commence this action. Accordingly, the court would allow the application of the 1st and 2nd defendants in encl. 13 and order that the suit be struck off with costs. Costs, which are to be borne by the Directors of the plaintiffs personally, are to be taxed unless otherwise agreed.

[44] In light of the decision of the court in encl. 13, the Directors' application in encl. 4 is also struck off with costs. Costs are to be taxed unless otherwise agreed, such costs to be borne by the Directors personally.